

**ORIGINAL**

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Attorneys for Plaintiff  
OFELIA COLOYAN

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

FEB 28 2006

at 3 o'clock and 15 min M  
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

OFELIA COLOYAN

Plaintiff,

vs.

WILLIAM BADUA, JEFFERY  
OMAI; SPENCER ANDERSON;  
NEIL PANG; and DOES 5-10

Defendants.

)  
) CIVIL NO. 03-00476-KSC  
)  
) PLAINTIFF'S MEMORANDUM IN  
) OPPOSITION TO DEFENDANTS  
) WILLIAM P. BADUA, SPENCER  
) ANDERSON, and JEFFERY  
) OMAI'S MOTION IN LIMINE NO.  
) 3 RE: PRECLUDING STEVEN M.  
) C. LUM, M. D. FROM TESTIFYING  
) AS AN EXPERT WITNESS;  
) CERTIFICATE OF SERVICE  
)

**HEARING:**

DATE: March 13, 2006

TIME: 1:30 p. m.

)  
) JUDGE: Hon. Kevin S. C. Chang  
) Trial is set for March 14, 2006.  
)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS  
WILLIAM P. BADUA, SPENCER ANDERSON and JEFFERY OMAI'S  
MOTION IN LIMINE NO.3 RE PRECLUDING STEVEN M. C. LUM, M. D.  
FROM TESTIFYING AS AN EXPERT WITNESS:

The Defendants object to Steven M. C. Lum, M. D. (hereinafter referred to as Dr. Lum), testifying, as an expert witness, on behalf of Plaintiff, on the grounds that she has not retained Dr. Lum as an expert witness, Dr. Lum has not prepared a report on the matters that he will be called upon to testify as required by Rule 26 (a) (2) (b) of the Federal Rules of Civil Procedure, and Dr. Lum has not conducted an independent medical examination.

As the Defendants admit Dr. Lum is the Plaintiff's "treating physician." As such Dr. Lum is familiar with her medical condition.

Rule 26 (a) (2) (B) contemplates two categories of expert witnesses: those who may qualify as experts, but who are *not* retained or specifically employed to testify, and those who are specifically retained or employed to testify. The reporting requirement of that rule only applies to the latter. Shapardon v. West Beach Estates, 172 F. R. D. 415 (D Haw. 1997)

Treating physicians fall into the former category of experts. Therefore, the

Plaintiff is entitled to have Dr. Lum testify on her behalf as an expert witness, even though he did not prepare a report of his findings. *id.* at pages 416-417 and Davoll v. Webb 194 F. 3d 1116, 1138 (10<sup>th</sup> Cir. 1999).

The relevant question is whether these treating physicians acquired their opinions as to the cause of the plaintiff's injuries directly through their treatment of the Plaintiff, If so, then they must be treated as treating physicians, who can be deposed under the amendments to Rule 26 but who cannot be forced to file the written report required by Rule 26 (a) (2) (B).

Shapardon, 172 F. R. D. 415, 417 citing Piper v., Harnischfeger Corp., 170 F. R. D. 173, 175 (D Nev. 1007).

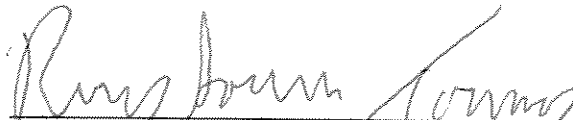
The Defendants do not point to any one piece of testimony by Dr. Lum that is not based upon knowledge that he obtained from his treatment of the Plaintiff. Therefore, Dr. Lum is capable of testifying as an expert witness in this matter.

#### CONCLUSION

***THE DEFENDANTS' MOTION IN LIMINE MUST BE DENIED.***

DATED: Honolulu, Hawaii, February 28, 2006

Respectfully Submitted

  
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JACK SCHWEIGERT  
ARTHUR E. ROSS  
RORY SOARES TOOMEY  
Attorneys for Plaintiff  
OFELIA COLOYAN

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CIVIL NO. 03-00476-KSC

CERTIFICATE OF SERVICE

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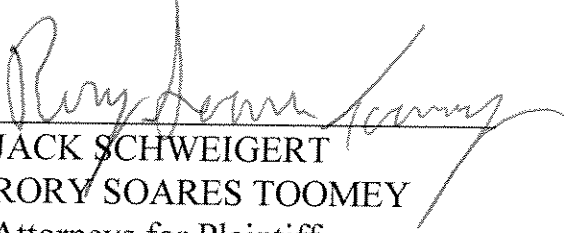
I **HEREBY CERTIFY** that on February 28, 2006, a copy of the attach  
document was served upon:

KENDRA K. KAWAI  
550 S. KING ST., Rm 110  
HONOLULU, HAWAII

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Attorney for Defendants  
WILLIAM BADUA; SPENCER  
ANDERSON, NEIL PANG

DATED: Honolulu, Hawaii, February 28, 2006

  
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OFELIA COLOYAN